APPENDIX

PREMIER ELECTRICAL CONSTRUCTION CO.

v.

MILLER-DAVIS CO., ET AL.

Decision of the United District Court for the Northern District of Illinois, Eastern Division

MEMORANDUM OPINION

MAROVITZ, District Judge.

Motions of Defendants to Dismiss and for Judgment on the Pleadings

This is a civil antitrust action in which plaintiffs seek to recover treble damages for injuries resulting from an alleged violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, 15.

Plaintiff, Premier Electrical Construction Company and defendant St. Arnaud Electrical Company are direct corporate competitors engaged in the electrical construction business. Defendant Miller-Davis is in the general contracting business. On February 3, 1966, the Atomic Energy Commission sent invitations to various general contractors, including defendant Miller-Davis, to submit bids for an addition to the Argonne National Laboratory, Argonne, Illinois. The project was known as the Accelerator Improvement ZGS, FY-65 Meson Building Addition. In order to prepare their bids, the general contractors, including Miller-Davis, then sent invitations to various electrical sub-contractors, including Premier Electrical Construction Company, requesting bids on the electrical work to be performed on the Argonne project.

Plaintiff alleges that sometime between January 15, 1966, and March 3, 1966, a conspiracy arose between Miller-Davis and St. Arnaud such that Miller-Davis would induce St. Arnaud's competitors, including plaintiff, to submit inflated bids to the competitors of Miller-Davis, thereby insuring a successful bid by Miller-Davis and a sub-contract for St. Arnaud. Plaintiff claims that on March 3, 1966, it submitted its bid by telephone to Miller-Davis, was advised that it was the low bidder and, assuming that Miller-Davis was awarded the prime contract, that it, Premier, would be awarded the electrical sub-contract on the condition that it would "protect" Miller-Davis by submitting artificially inflated bids to other general contractors.

In its complaint (¶12), plaintiff acknowledges that it agreed to "protect" Miller-Davis if Miller-Davis would inform plaintiff of its receipt of a lower bid by a third party so that plaintiff could rebid to defendant's competitors. Miller-Davis did not advise plaintiff of any competitive bid on the electrical sub-contract. Plaintiff did submit high bids to general contractors other than Miller-Davis. The Atomic Energy Commission awarded the contract to Miller-Davis who then gave the sub-contract to defendant St. Arnaud.

On October 13, 1966, in another District Court for the Northern District of Illinois, Eastern Division, plaintiff filed a suit against Miller-Davis entitled Premier Electrical Construction Co. v. Miller-Davis Co.; Civil Action No. 66 C 1850. Plaintiff's amended complaint in that case set forth basically the same facts alleged in the present suit, save for the purported involvement of St. Arnaud. The language of the amended complaint in the first suit is virtually identical to that recited in the instant issue, especially in those paragraphs which relate to the agreement to "protect" Miller-Davis. The original action sought

$40,000 for breach of contract. Trial ended on March 27, 1968, and the case was taken under advisement. A decision is expected to be rendered shortly. In the present complaint, filed March 4, 1968, plaintiff claims deprivation of profits amounting to $65,000 as its damages and seeks an award of treble damages under 15 U.S.C. § 15.

Defendant Miller-Davis has moved to dismiss the present suit on the grounds of *res judicata* and *in pari delicto*. Defendant St. Arnaud seeks a judgment on the pleadings based on the doctrine of *in pari delicto*. Defendants admit plaintiff's factual allegations regarding the contract and sub-contract negotiations for the limited purpose of making their motions.

Because its first suit is based on contract while the present case stems from an alleged violation of the Sherman Act, plaintiff suggests that the respective causes of action are "totally separate and distinct in every respect." (Brief at 3). This argument is not well taken. It is the facts in each case, not the theories, which are crucial in determining the applicability of *res judicata*. Wolcott v. Hutchins, 245 F.Supp. 578 (S.D.N.Y. 1965), aff'd 365 F.2d 833 (2d Cir. 1966). Both of plaintiff's suits arise out of the same operative facts and disputed transactions the end result of which was the failure of plaintiff to secure the electrical sub-contract from Miller-Davis. The mere addition of a new, federal theory will not support new litigation.

The closest case in point to the one at bar is Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961). In that case as here, plaintiff first filed a contract action and later sought relief in a

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* Premier Electrical Construction Company v. Miller-Davis Company, Sept. 23, 1968, 291 F. Supp. 295.

civil antitrust suit. Both cases were based on the same refusal of defendant to deal with the plaintiff. The Court of Appeals for the Fifth Circuit held the former case to be *res judicata* of the later one. The Court said at 363-364,

> "It is settled, contrary to appellant's contention, that a litigant may not split his claim and have two trials on the same alleged breach of duty. Basically, Norman claimed the same 'right' in both suits—the right to purchase Gillette products directly from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman. We held in the contract case that Norman had not shown that Gillette wrongfully refused to deal with it. There, appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies upon the breach of the anti-trust laws as the basis for the alleged breach. But there was but one breach and one only and appellant has had its day in court and has lost. It cannot litigate this same breach again. (Citing cases)."

Plaintiff relies on Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964) and Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927). In *Engelhardt*, however, a decision in an earlier suit under Missouri antitrust law was held to be *res judicata* in the later suit brought under federal antitrust statutes despite the incorporation of more specific allegations of interference in interstate commerce and a prayer for a different amount of damages. A plaintiff must plead his entire case on all theories at one time. Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 320, 47 S.Ct. 600, 71 L.Ed. 1069 (1927); Engelhardt v. Bell & Howell Co., 327 F.2d 30, 33 (8th Cir. 1964). This plaintiff has not done. In fact, Premier filed the present suit within a few weeks prior to the trial of its original suit against Miller-Davi

Nor will a change in parties necessarily affect the applicability of *res judicata*. See, e. g., Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927) In Koblitz v. Baltimore and Ohio Railroad Co., 164 F.Supp. 367 (S.D.N.Y.1958), the Court held that a new charge of conspiracy in a second suit brought by plaintiff against defendant was not sufficient to preclude the application of *res judicata* in the second case. The Court said, at 372,

> "Here the wrongs complained of, the harm to the plaintiff and the recovery sought are substantially identical. The same witnesses and the proof of the same facts would be necessary to establish the allegations of the prior complaint and would support both actions. * * *
>
> "To the extent, if at all, that the allegations of the present complaint are dissimilar to those in the prior action, all the facts now pleaded were known to the plaintiff and could have been presented in the first action."

As to defendant Miller-Davis, *res judicata* would be a good defense if there were a final judgment in the first suit. While a decision is expected in a few days, such a final judgment has not yet been handed down. However, concurrent duplicate litigation is no less undesirable than successive duplicate litigation. In either situation, a second suit violates principles of comity between judges, creates administrative inefficiencies in the federal courts, and imposes an unfair burden on the defendant. Eastern States Petroleum & Chemical Corp. v. Walker, 177 F. Supp. 328, 333 (S.D.Tex.1959); Emerson Electric Manufacturing Co. v. Emerson Radio and Phonograph Co., 140 F.Supp. 588, 589 (D.N.J.1956). Thus, the public policies in favor of a single suit in a single controversy and against contentious litigation remain viable. Asbury v. Chesapeake & Ohio Railway Co., 264 F.Supp. 437, 438 (D.Col.1967); Paluchowska v. United States Lines Co., 93 F.Supp. 751,

752 (S.D.N.Y.1950). The pendency of a prior action in the same jurisdiction, between the same parties, and arising out of the same transaction constitutes good grounds for abating the subsequent suit. Commerce Oil Refining Corp. v. Miner, 303 F.2d 125 (1st Cir. 1962). Consequently, the motion to dismiss of defendant Miller-Davis is granted.

Defendant St. Arnaud was not a party in the original action brought by Premier and may not now plead *res judicata* or take advantage of abatement. St. Arnaud's motion for judgment on the pleadings is based on the defense of illegality. Miller-Davis has adopted the arguments of St. Arnaud as additional support for its motion to dismiss. The Court is faced with two questions: whether plaintiff's agreement with Miller-Davis is illegal and, if illegal, whether plaintiff is barred from recovery of treble damages in a civil antitrust suit.

Defendants claim that Premier is seeking to collect on an illegal bid-rigging agreement. Plaintiff, in his complaint, affirmatively pleaded that, as consideration for a promise of business, it agreed to "protect" Miller-Davis by submitting higher bids to other general contractors, but now suggests that such conduct is not illegal because the agreement was not between direct competitors. Premier even asserts that its agreement "could only promote competition between the various contractors [because plaintiff] removed itself from competition." (Brief at 9).

That Premier's conduct is illegal is clear. In accord with a secret agreement with one of the defendants, plaintiff presented artificially inflated bids to all general contractors who were competitors of Miller-Davis. By failing to submit the same low bid on the subcontract to all general contractors, plaintiff intended to insure the success of one favored party. "A bargain not to bid at * * * any public competition for a * * * contract, having as its pri-

mary object to stifle competition, is illegal." Restatement, Contracts § 517 (1932). The falsification of a bid, in itself and by effectively excluding others from competition, stifled the unfettered operation of the market place. A restraint on price competition and on meaningful access to the market is illegal *per se*. United States v. General Motors Corp., 384 U.S. 127, 145-147, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Rigging competition on a public contract whether done directly or indirectly, is simply a restraint of trade in violation of public policy and void. See generally, Corbin, Contracts § 1468 (1962).

Plaintiff attempts to avoid the impact of these clear rules, claiming that it was not a direct competitor with the other party to the protection agreement. However, the particular form taken by the agreement, whether price fixing or profit sharing, horizontal or vertical, is really immaterial. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Thus, in Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817 (10th Cir. 1965), cert. denied, 384 U.S. 918, 86 S.Ct. 1365, 16 L.Ed.2d 439 (1966), it was held that foreclosure of a subcontractor's competitive bid to general contractor by repressive rules of a bid depository association was illegal.

Given, then, that plaintiff's conduct is illegal, may he nevertheless recover treble damages in a civil antitrust suit? Plaintiff submits that the recent Supreme Court decision in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d (1968), precludes defendants' use of the doctrine of *in pari delicto*, under which a court will not entertain a suit brought by a party in equal fault with the defendant(s). At first blush, plaintiff seems correct for Mr. Justice Black, in an-

nouncing the Court's decision, held "that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." 392 U.S. at 140, 88 S.Ct. at 1985.

A closer look at the opinion, however, suggests that the quoted statement neither deserves nor was intended to have universal application. The Court's opinion rests on two pillars: one, mere participation in an illegal scheme is not a sufficiently serious wrong to warrant denial to plaintiff of his chance in court and, two, the public policy in favor of competition is furthered by allowing private suits for treble damages. The opinion stresses and must be read in light of, the facts. In the Court's view, plaintiff's lack of initiative and commitment to the illegal scheme was crucial. Thus, "their [petitioner's] participation was not voluntary in any meaningful sense," "many of the clauses [in the franchise agreement] were quite clearly detrimental," "acquiescence was necessary," and "plaintiff did not aggressively support * * * the * * * scheme." Rather, the arrangement was "formulated and carried out by others" and "thrust upon them" by defendants. 392 U.S. at 139-141, 88 S.Ct. at 1985, 1986. On these facts, Mr. Justice Black held that plaintiffs could maintain their action.

However, the Court refused to go farther, to extend its decision to cover cases involving a more tainted petitioner. Mr. Justice Black, at 140, 88 S.Ct. at 1985, said:

> "We need not decide, however, whether such truly complete involvement and participation in a[n] [illegal] scheme could ever be a basis, wholly apart from the idea of *pari delicto*, for barring a plaintiff's cause of action * * *."

That the defense of illegality is still viable in civil antitrust actions is further supported by the other four opinions in the case. Mr. Justice White, in his concurring opinion, stated that a condition precedent to allowing a tainted

plaintiff to proceed with a treble damages suit was that plaintiff's participation was coerced or thrust upon him. He cautioned, however, that a moving force "should not be rewarded for his efforts to further an unlawful price arrangement" and take from defendant treble damages. 392 U.S. at 145, 88 S.Ct. at 1988. The approach of Mr. Justice Fortas was similar for he said that a co-adventurer, one who "originated and insisted" upon the illegal scheme could not recover damages. 392 U.S. at 147-148, 88 S.Ct. 1981, 1989. Mr. Justice Marshall would allow the defense of illegality against a plaintiff who "actively participated in the formulation and implementation" of the illegal scheme. 392 U.S. at 149, 88 S.Ct. at 1989. Justices Harlan and Stewart agree that *in pari delicto* has its place in anti-trust cases. 392 U.S. at 153, 88 S.Ct. 1981.

Thus, in each of the five opinions in the case, the door was left open for a limited application of a defense of illegality in civil antitrust actions. The distinctions drawn throughout the various opinions are particularly relevant here. Premier is not a mere participant or unwilling victim of the transaction out of which this case arose. Rather, Premier was an originating, moving, active and aggressive party to the illegal bid-rigging scheme. There is no indication that the Supreme Court sought to protect a plaintiff so intensely involved in an illegal restraint on trade.

Moreover, it is difficult to see how allowing a suit for treble damages, under the facts in this case, would be consistent with the purposes of the antitrust laws, the second main rationale advanced by Mr. Justice Black for his decision in *Perma Life*. Discussing an example similar to the present case, Mr. Justice White noted, at 146, 88 S.Ct. at 1988:

> "To permit [plaintiff] a recovery may be a counter-deterrent. By assuring him illegal profits if the agree-

> ment in restraint of trade succeeds, and treble damages if it fails, it may encourage what the Act was designed to prevent."

Conversely, if allowing relief would be counterproductive, and possibly add an undesirable incentive to violate the law, denial of relief to plaintiff, as the Supreme Court has recognized for many years will, more probably, discourage involvement in illegal schemes.

> "The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law * * * the less inclined will they be to enter into them. In that way the public secures the benefit of rigid adherence to the law." McMullen v. Hoffman, 174 U.S. 639, 670, 19 S.Ct. 839, 851, 43 L.Ed. 1117 (1899).

Plaintiff in this case initially violated the law in an attempt to secure a public contract. Having failed, it now seeks not just refuge, but reward in this court. We find no sanctuary in the *Perma Life* decision for a plaintiff like this. If ever a party was to be barred from recovering treble damages, it is Premier. While we sanction the defense of illegality, call it *in pari delicto* if you will, in these circumstances, it is not, of course, because of our approval of defendants' actions, but because the law will not enforce what is forbidden, and "will leave the parties as it finds them." McMullen v. Hoffman, 174 U.S. 639, 670, 19 S.Ct. 839, 851, 43 L.Ed. 1117 (1899). Consequently, plaintiff will not be permitted, having attempted to avoid the burdens, now to reap the benefits of the law.* The respective motions of Miller-Davis and St. Arnaud to dismiss and for judgment on the pleadings are granted.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

Nos. 17290, 17312

PREMIER ELECTRICAL CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v.

MILLER-DAVIS COMPANY and ST. ARNAUD ELECTRIC COMPANY,

Defendants-Appellees.

PREMIER ELECTRICAL CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v.

MILLER-DAVIS COMPANY,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

March 6, 1970

Before SWYGERT, *Chief Judge*, KERNER, *Circuit Judge*, and WISE, *District Judge*.[1]

SWYGERT, *Circuit Judge*. These are consolidated appeals in companion cases. No. 17312 is an appeal from

[1] Judge Henry S. Wise is sitting by designation from the United States District Court for the Eastern District of Illinois.

judgment in favor of Miller-Davis Company after a bench trial on the merits in a breach of contract action instituted by Premier Electrical Construction Company against Miller-Davis. No. 17290 is an appeal from the dismissal on the pleadings of a treble damage antitrust action instituted by Premier against Miller-Davis and St. Arnaud Electric Company. We affirm the judgment in favor of Miller-Davis on the contract action. We reverse the judgment dismissing Premier's antitrust complaint and remand for trial.

The Contract Action

The facts relating to the contract action are substantially as follows: In February 1966, the Atomic Energy Commission invited several general contractors, including Miller-Davis, to bid on a project at the Argonne National Laboratories, Argonne, Illinois. The Commission requested a base bid and a bid for nine alternates. The bids were to be opened at 2 p.m., March 3, 1966. The electrical portion of the contract comprised approximately one-third of the total work. Miller-Davis invited bids from several electrical subcontractors, including Premier.

On March 2, 1966, the day before the bids were to be submitted, Stanley Wielgos, Premier's vice-president, telephoned Paul Hunsberger, assistant division manager of Miller-Davis. Wielgos stated that Premier wanted to work with Miller-Davis and requested some assurance that Miller-Davis would work with Premier if Premier was the lowest bidder on the electrical subcontract work. Hunsberger gave no assurance but asked Wielgos to call back at 12:30 on March 3. Wielgos mentioned a base bid of $450,000 to $500,000 during the March 2 conversation.

At 12:30 p.m. on March 3, Wielgos called Hunsberger. Wielgos gave Hunsberger a base bid of $274,100 and an overall bid—the base bid plus the nine alternate bids—of

$494,800. Hunsberger said the bid was "very interesting." Wielgos asked, "Do we have a job if you have one?" Hunsberger replied, "If it goes in now, you have a job." Hunsberger then intimated that he would like "sizeable protection" on Premier's price. Both Wielgos and Hunsberger understood that "protection" meant that Premier would submit higher bids to Miller-Davis' competitors so that the latter would have the lowest electrical costs. The submission of inflated bids would nearly insure that Miller-Davis would be the lowest bidder on the prime contract since there was a substantial difference (about $200,000) between Premier's and the other subcontractors' bids for the electrical work. Wielgos accepted this arrangement saying, "[W]e are banking on you getting the job and we are willing to gamble on you and you only."

At Hunsberger's suggestion Wielgos called back around 1 p.m. on March 3 to see if Premier's bid was still the lowest. Hunsberger said that it was and told Wielgos "as it stands now, you [have the job]." Wielgos called again at 1:30 p.m. and was told that his was still the lowest bid. Wielgos told Hunsberger that if Premier's bid was not the lowest, he wanted to submit Premier's Miller-Davis' bid to the other general contractors.

During the morning and early afternoon of March 3 Hunsberger received bids from other electrical subcontractors. Around 1:40 p.m. Hunsberger told William Sinclair, vice-president and Chicago division manager of Miller-Davis, that another electrical subcontractor, St. Arnaud Electrical Company, had submitted cost figures of $225,000 on the base bid. Sinclair called Joe Abrams, electrical engineer for St. Arnaud, and asked if St. Arnaud would take the job for a base bid of $255,000. Abrams accepted this suggestion five minutes later. Sinclair incorporated St. Arnaud's electrical base bid in

Miller-Davis' overall bid estimate and contacted Richard Larson, a Miller-Davis employee, who actually submitted the bid at the Argonne facilities. Miller-Davis subsequently was awarded the contract with the Atomic Energy Commission and a written contract was executed. Miller-Davis, in turn, awarded the electrical subcontract to St. Arnaud.

On March 3 and 4 Wielgos called Hunsberger several times and asked if Premier's figures had been used in the Miller-Davis' bid. Hunsberger refused to answer this inquiry. In a conversation on March 4 Wielgos angrily asked Hunsberger whether or not there had been an "agreement" between Premier and Miller-Davis. Hunsberger admitted that there had been.

On these facts the district court held that no contract was formed since the dealings between the parties did not possess the requisites of a formal contract.[2] The court further held that even if a contract was formed, it, nevertheless, would be unenforceable because of the illegality of its terms. Since we affirm the district court's holding that no contract was formed, we need not consider the alternate holding that the contract was illegal.

If the rules ordinarily applicable to the formation of subcontracts are applied in this case, the communications between Premier and Miller-Davis constitute, at best, negotiations preliminary to the formation of a contract. The submission of a bid for a subcontract is an offer. 1 CORBIN, CONTRACTS § 24 (1950). Acceptance of a subcontractor's bid generally occurs only when a written contract specifically setting out the terms of the agreement is entered into by the general contractor and the

[2] The district court's opinion is reported at 291 F.Supp. 295 (N.D.Ill. 1968).

subcontractor. *Plumbing Shop, Inc.* v. *Pitts*, 67 Wash.2d 514, 408 P.2d 382 (1965). The use of a subcontractor's bid by a general contractor in preparing his bid on the prime contract does not constitute acceptance of the offer, *Merritt-Chapman & Scott Corp.* v. *Gunderson Bros. Engineering Corp.*, 305 F.2d 659 (9th Cir. 1962). *Williams* v. *Facret*, 161 F.2d 822 (5th Cir. 1947). Many courts have held that the same rule applies even if the general contractor is awarded the prime contract. *Baird Co.* v. *Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933); *but cf. Drennen* v. *Star Paving*, 51 Cal.2d 409, 333 P.2d 757 (1958). Since Premier's bid was not used in Miller-Davis' final bid, and was not accepted through the formation of a written contract, no contract was formed.

Premier argues, however, that the ordinary rules do not apply in this case. We agree that proof of business custom or evidence of express intent to the contrary can modify the general rules set out above and demonstrate that the parties intended that a contract be formed prior to the signing of a written agreement. *Industrial Electric Seattle, Inc.* v. *Bosko*, 67 Wash.2d 783, 410 P.2d 10 (1966), *cf. Traff* v. *Farbo*, 337 Ill.App. 83, 84 N.E.2d 874 (1949). Premier has offered no evidence of business custom contrary to these rules and instead relies only upon the conversations between Wielgos and Hunsberger to demonstrate that Miller-Davis accepted Premier's bid.

Premier makes two arguments. Premier first contends that during the telephone conversations on March 3 Miller-Davis accepted Premier's bid in return for "protection" provided by Premier subject to the condition that the general contract was ultimately awarded to Miller-Davis. The district court found, and we agree, that the evidence fails to support this contention. On the contrary, those conversations indicate that both parties re-

tained their freedom to withdraw at any time. Thus, Hunsberger repeatedly emphasized to Wielgos that Premier was entitled to nothing if a lower bid was made by another subcontractor. Wielgos understood this to be the case as evidenced by his repeated questioning of Hunsberger concerning how his bid was "holding up" and by his assertion in the 1:30 p.m. conversation on March 3 that he wished to publish his Miller-Davis' bid to other general contractors in the event that his bid was not the lowest.

Premier's second argument asserts that Premier and Miller-Davis entered into a much more complicated arrangement. In return for "protection" it is alleged that Miller-Davis orally accepted Premier's bid subject to the following conditions: that Premier was the lowest bidder; that Miller-Davis used Premier's bid in preparing its prime bid; and that Miller-Davis was awarded the prime contract. The district court found that such an agreement had been formed, relying primarily on a vague admission by Hunsberger in the telephone conversation with Wielgos on March 4. Nevertheless, this agreement standing alone would be insufficient to give Premier a cause of action since St. Arnaud's bid was lower than Premier's and was used in calculating Miller-Davis' bid on the general contract. The district court found, however, that a collateral promise existed whereby Miller-Davis agreed not to inform anyone of the exact amount of Premier's bid. The court further found that this collateral promise was breached and that Miller-Davis was estopped from denying that Premier's bid was lowest. We disagree. The record contains little evidence that such a promise was made and no evidence that Miller-Davis informed St. Arnaud or anyone else of the exact amount of Premier's subcontract bid to Miller-Davis. Therefore,

even if we were to agree that the complicated arrangement set out above actually existed, there is no evidence that its conditions were breached. Thus we hold that no contract was formed. Miller-Davis advances several additional defenses to Premier's claim that an enforceable contract was formed between Miller-Davis and Premier.[3] In light of our holding these additional arguments need not be considered.[4]

The Antitrust Action

The antitrust action instituted by Premier was filed subsequent to its action based on contract and was heard by a different district judge. On September 16, 1968, seven days prior to the decision on the merits in the contract action, Premier's antitrust action was dismissed following a motion for judgment on the pleadings.[5] The district court held that Premier was barred from maintaining its action against Miller-Davis and St. Arnaud under the doctrine of *in pari delicto*. The court further

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[3] Miller-Davis argues that the contract contemplated by the parties involved complicated and detailed provisions not discussed by Hunsberger and Wielgos. Therefore, since the alleged oral contract involved only the price of the subcontract work it lacked sufficiently definite terms to create a contract between Miller-Davis and Premier. Miller-Davis further argues that any contract so formed would be invalid under the statute of frauds. Finally, Miller-Davis argues that Premier suffered no damages since St. Arnaud lost money in the performance of the sub-contract work.

[4] The district court accepted Miller-Davis' first argument, holding that the alleged oral agreement was indefinite and unenforceable. *Plumbing Shop, Inc.* v. *Pitts*, 67 Wash.2d 514, 408 P.2d 382 (1965). The district court did not reach Miller-Davis' statute of frauds and the damages defenses.

[5] The district court's opinion is reported at 292 F.Supp. 213 (N.D.Ill. 1968).

held that the doctrine of res judicata prevented Premier from asserting its antitrust claim against Miller-Davis. In those rulings the district court erred.

In considering Premier's appeal from the dismissal of its antitrust claim we are limited to the pleadings which were before the district court. The essential allegations of Premier's complaint are contained in paragraphs 9 and 11.[6] In paragraph 9 Premier alleged that Miller-Davis and St. Arnaud entered into a conspiracy to induce St. Arnaud's competitors to submit inflated electrical subcontract bids to Miller-Davis' competitors. Miller-Davis would obtain the general contract as a result and there-

[6] Paragraph 9 of the complaint reads:

> 9. That sometime between January 15, 1966, and March 3, 1966, the defendants by and between themselves conspired to restrict the competition of the defendant, Miller-Davis Company, for the said A.E.C. contract in that the defendants entered into a secret agreement wherein the defendant, Miller-Davis Company, would induce the defendant, St. Arnaud Electric Company's competitors, including the plaintiff as hereinafter set forth, to submit substantially higher bids to defendant, Miller-Davis Company's competitors thereby insuring that the defendant, Miller-Davis Company, would be the successful bidder, who in turn would then award the electrical subcontract to the defendant, St. Arnaud Electric Company, on a noncompetitive basis.

Paragraph 11 of the complaint reads:

> 11. That on March 3, 1966, plaintiff submitted by telephone its oral bid to the defendant, Miller-Davis Company; that at the time that plaintiff submitted its bid to the said defendant, the said defendant in furtherance of the said secret agreement between the defendants, advised plaintiff that it was the low bidder as of the time and date the bid was received, and further advised plaintiff that if plaintiff would "protect" the defendant, Miller-Davis Company, by submitting higher electrical bids to said defendant's competitors, it would award plaintiff the electrical subcontract providing that the defendant, Miller-Davis Company, was the successful bidder with the A.E.C.

after would award the electrical subcontract to St. Arnaud on a noncompetitive basis. Paragraph 11 alleges that Miller-Davis induced Premier to submit higher electrical subcontract bids to Miller-Davis' competitors and assured Premier that it would in return receive the electrical subcontract.

On the basis of these pleadings the agreement between Miller-Davis and Premier constitutes a per se violation of the Sherman Act. By preventing Premier from submitting bids to other general contractors at the same prices made available to Miller-Davis, the agreement constitutes a concerted refusal to deal. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). The general contractors were thereby denied meaningful access to the market for the Argonne project contract. *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). Thus, on similar facts the court in *Mechanical Contractors Bid Depository* v. *Christiansen*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966), held that a bid depository agreement which prevented the plaintiff-subcontractor from submitting competitive bids to general contractors was illegal under the antitrust laws. We also believe the agreement violates the prohibition against price restraints. As the Supreme Court said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940): "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price . . . is illegal." The intended effect and probable result of the agreement here was to cause a higher overall price on the Argonne project contract than would otherwise have prevailed.

The defendants rely upon *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), to establish their contention that the illegality of Premier's con-

duct forecloses its right to maintain this suit. In *Perma Life*, Mr. Justice Black writing for five members of the Court said, ". . . the doctrine of *in pari delicto*, with all its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action. . . ." *Perma Life Mufflers* v. *International Parts Corp.*, *supra* at 140. We believe that *Perma Life* stands for a more limited rule, however, since Mr. Justice Black expressly reserved the question ". . . whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring the plaintiff's cause of action . . ." *Perma Life Mufflers* v. *International Parts Corp.*, *supra* at 140. On the basis of the pleadings before him, Mr. Justice Black found that plaintiffs' participation in the illegal agreement with Midas was "not voluntary in any meaningful sense" and that they "accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity." *Perma Life Mufflers* v. *International Parts Corp.*, *supra* at 139. Thus we believe that *Perma Life* holds only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants.

Many factors are, therefore, relevant in determining whether participation by the plaintiff in an illegal agreement constitutes a defense to his treble damage action. Difficult factual questions are involved in making such a determination. This is especially true where, as here, the plaintiff and defendant are not competitors but instead are dealing at arm's length in a vertical relationship in the purchase and sale of goods and services. In such

cases the relative bargaining power of each party to the agreement is relevant in ascertaining whether the plaintiff was forced by economic pressures to enter into the agreement. Similarly, evidence concerning the formation of the agreement including facts pertaining to which party initiated each of its provisions may control the availability of the defense in particular situations.

The district court erred in holding that these factual questions were sufficiently resolved by the allegations of the pleadings. In antitrust cases where factual questions play important roles, summary procedures should be avoided. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). On the basis of the pleadings before us we cannot say that Miller-Davis did not possess sufficient bargaining power in its dealings with Premier to force Premier to offer protection to Miller-Davis. Furthermore, the factual question of who actually initiated the protection scheme is completely unresolved by the pleadings. Remand of this case will allow these and other questions to be more fully considered.

The district court, in an alternate holding, determined that Premier's action against Miller-Davis was barred by the doctrine of res judicata. We disagree. Before a prior action can be res judicata, a final judgment in that action must be rendered. *Sypert* v. *Miner*, 266 F.2d 196 (7th Cir. 1959); *Muchard* v. *Berenson*, 307 F.2d 368 (9th Cir. 1962). Therefore, since final judgment had not been rendered in the contract action when the decision was announced in the antitrust action, res judicata was inappropriate.

Miller-Davis, without citing authority, maintains that this defect is now cured since final judgment has been entered in the contract action and that we should therefore affirm the district court's alternate holding. Assum-

ing without deciding that we could affirm the district court on this basis, we, nevertheless, think that res judicata would be inapplicable to bar Premier's antitrust claim.[7] The cases cited by Miller-Davis including *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964), and *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961), are distinguishable. The allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts.[8] The antitrust claim rests primarily upon a conspiracy between Miller-Davis and St. Arnaud to deceive Premier occurring prior to any dealings between Premier and Miller-Davis. Although the difficulty of proving such a conspiracy may be great, we believe the complaint alleges injury to Premier wholly apart from breach of contract.

For these reasons the judgment in appeal 17312 is affirmed and the judgment in appeal 17290 is reversed and remanded for trial.

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[7] Miller-Davis does not argue and we do not decide whether the doctrine of collateral estoppel is applicable to facts proved in the contract action in determining the availability of the defense of *in pari delicto* in this case.

[8] The district court apparently recognized the res judicata was inappropriate and based his dismissal of Premier's action against Miller-Davis in part on the ground of comity. In light of our holding that the antitrust and contract actions constitute separate causes of actions, we believe that comity would, at most, have justified a stay of the antitrust action pending the outcome of the contract action.